FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Benjamin L. Ginsberg
Patton Boggs, LLP
2550 M Street, N.W.
Washington, D.C. 20037-1350

MAR 2 5 2003

RE: MUR 5199
Bush-Cheney 2000, Inc. and
David Herndon, as Treasurer

Dear Mr. Ginsberg:

On May 4, 2001, the Federal Election Commission notified your clients, Bush-Cheney 2000, Inc., and David Herndon, as Treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information provided by you, the Commission, on March 20, 2003, found that there is reason to believe Bush-Cheney 2000, Inc. and David Herndon, as Treasurer, violated 2 U.S.C. §§ 434(b)(2)(J), 434(b)(4)(G) and (I), 434(b)(3)(G), and 434(b)(6)(A), provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's findings, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

In order to expedite the resolution of this matter, the Commission has also decided to offer to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Enclosed is a conciliation agreement that the Commission has approved. If you are interested in expediting the resolution of this matter by pursuing preprobable cause conciliation, and if you agree with the provisions of the enclosed agreement, please sign and return the agreement, along with the civil penalty, to the Commission. In light of the fact that conciliation negotiations, prior to a finding of probable cause to believe, are limited to a maximum of 30 days, you should respond to this notification as soon as possible.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. If you have any questions, please contact Tracey L. Ligon, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Bradley A. Smith
Vice Chairman

Enclosures
Factual and Legal Analysis
Conciliation Agreement

cc: candidate

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Bush-Cheney 2000, Inc. and
David Herndon, as Treasurer

MUR:

I. GENERATION OF THE MATTER

The Democratic National Committee ("DNC") filed a complaint with the Federal Election Commission ("the Commission") on April 27, 2001, alleging that Bush-Cheney 2000, Inc., and David Herndon, as Treasurer ("the Respondents"), violated 2 U.S.C. §§ 434(a)(3) and 434(b) and 11 C.F.R. Part 104 by failing to report any of the receipts or disbursements of the Bush-Cheney Recount Fund ("BCRF").

II. BACKGROUND

In the wake of the recount following the November 7, 2000 presidential election, the Respondents formed the BCRF in order to raise funds and pay costs associated with the recount and election contest. Respondents state that the BCRF was established in mid-November 2000, as a part of Bush-Cheney 2000, and that no monies associated with the BCRF were either raised or expended to finance activities that constituted "qualified campaign expenses" or activities permitted to be paid for by the General Election Legal and Accounting Committee. The BCRF did not register with or file disclosure reports with the Commission. The BCRF also apparently did not register with or file reports with the Internal Revenue Service.

The complaint states that "Bush-Cheney, Inc., has publicly claimed that its recount fund is actually part of the presidential campaign committee, thereby relieving the recount fund from the requirement to file periodic disclosure reports with the Internal

Revenue Service, as mandated by the 'stealth PAC' law enacted in 1999 (P.L. 106-230)." Public Law 106-230 (July 1, 2000). The complaint posits that "If the Bush-Cheney recount fund is not required to file reports with the IRS because it is part of the presidential campaign committee, then Bush-Cheney must report the receipts and disbursements of the recount fund to the Commission."[1] Complaint, pp. 1-2. The complaint cites Advisory Opinion 1978-92 and Advisory Opinion 1998-26 in support of the position that Bush-Cheney 2000, Inc. was required to disclose all receipts and disbursements of the BCRF in disclosure reports filed with the Commission.

In response to the complaint, Respondents argue that the Federal Election Campaign Act of 1971, as amended ("the Act"), the Presidential Election Campaign Fund Act, the Commission's regulations, and its advisory opinions do not require the reporting of the receipts and disbursements of a fund established by a publicly-funded Presidential campaign for recount purposes. In this vein, the Respondents note that there is no requirement that a separate account established solely for recount purposes within a publicly-funded presidential campaign report its receipts and disbursements; that the record-keeping and reporting regulations applicable to publicly-funded presidential campaigns require the reporting of "all expenditures" and "contributions or loans;" and that donations to and disbursements by a fund established by a publicly-funded presidential campaign are specifically exempted from the definition of contribution and expenditure.

[1] The complaint notes that Section 527 of the Internal Revenue Code, as amended by P.L. 106-230, requires any political organizations with annual gross receipts of over $25,000 to file a notice of status with the Internal Revenue Service ("IRS"), unless the organization is a federal political committee registered with and reporting to the Commission. (Internal Revenue Code §§ 527(i)(5)-(6)).

III. FACTUAL AND LEGAL ANALYSIS

A. The Law

An authorized committee of a candidate for Federal office must report the following categories of receipts: (i) contributions from persons other than political committees; (ii) contributions from the candidate; (iii) contributions from political party committees; (iv) contributions from other political committees; (v) total contributions; (vi) transfers from other authorized committees of the same candidate; (vii) loans; (viii) federal funds received under Chapter 95 and Chapter 96 of Title 26 of the U.S. Code; (ix) offsets to operating expenditures; (x) other receipts; and (xi) total receipts. 11 C.F.R. § 104.3(a)(3)(i)(xi); *see* 2 U.S.C. § 434(b)(2)(A)-(K). The committee must also report, *inter alia*, the identification of each person who provides any dividend, interest, or other receipt to the committee in an aggregate value or amount in excess of $200 within the calendar year in 2000, and within the election cycle beginning in 2001, together with the date and amount of any such receipt. 2 U.S.C. § 434(b)(3)(G); 11 C.F.R. § 104.3(a)(4)(vi). The requirement that the committee report the "identification" of such contributors means the committee must report, in the case of an individual, his or her full name; mailing address; occupation; and the name of his or her employer; and, in the case of any other person, the person's full name and address. 11 C.F.R. §§ 100.12 and 104.3(a)(4)(vi).

An authorized committee of a candidate for Federal office must report the following categories of disbursements: (i) operating expenditures; (ii) transfers to other committees authorized by the same candidate; (iii) repayment of loans; (iv) for an authorized committee of a candidate for the office of President, disbursements not subject

to the limitations of 11 C.F.R. § 110.8 (concerning dollar limits on expenditures); (v) offsets; (vi) other disbursements; and (vii) total disbursements. 11 C.F.R. § 104.3(b)(2)(i)-(vii); *see* 2 U.S.C. §§ 434(b)(4)(A)-(I). The committee must also report, *inter alia*, the name and address of each person who has received a disbursement that falls within the "any other disbursement" category in an aggregate amount or value in excess of $200 within the calendar year in 2000, and within the election cycle beginning in 2001, together with the date, amount, and purpose of any such disbursement. 2 U.S.C. § 434(b)(6)(A); 11 C.F.R. § 104.3(b)(4)(vi).

B. Analysis

The issue in this matter is whether the receipts and disbursements of the Bush-Cheney Recount Fund are reportable transactions of Bush-Cheney 2000, Inc. This issue turns on whether the recount fund was established within the political committee or established as a separate organizational entity. In Advisory Opinions 1998-26 and 1978-92, the Commission concluded that a separate organizational entity established solely for purposes of funding a recount effort would not become a political committee and would not be required to file disclosure reports; however, if a federal political committee establishes any bank account for recount purposes, the receipts and disbursements of those accounts would be reportable transactions of the committee, within the categories of "other receipts" and "other disbursements."

The facts in this matter show that the recount fund was established and conducted within Bush-Cheney 2000, Inc. By the Respondents' own account, the BCRF "was established in mid-November *as a part of Bush-Cheney 2000*." (emphasis added). Furthermore, the Respondents' admission is borne out by its conduct. During the general

election campaign, the Respondents held a bank account designated "Bush-Cheney 2000, Inc. – Media." In November, 2000, the Respondents redesignated this account the "Bush-Cheney 2000, Inc. – Recount Fund" and used the account for recount activities. For its entire lifespan -- from mid-November 2000 until approximately November 2001 -- the recount fund existed only as an account established as a part of, and conducted within, the Committee.[2] Because the recount fund was a part of Bush-Cheney 2000, Inc., the Respondents were required to report the recount receipts and disbursements as reportable transactions of the Committee, within the categories of "other receipts" and "other disbursements." *See* 2 U.S.C. §§ 434(b)(2)(J) and 2 U.S.C. § 434(b)(4)(G) and (I); *see also* Advisory Opinions 1998-26 and 1978-92.

The Internal Revenue Code ("the Code") imposes reporting and disclosure requirements on political organizations that have tax-exempt status under the Code and receive or expect to receive $25,000 or more in gross receipts in any taxable year. *See* 26 U.S.C. § 527. Under the Code, such a political organization must file a Political Organization Notice of Section 527 Status form with the Internal Revenue Service (IRS) within twenty-four hours after the date on which the organization was established, and must also file periodic reports disclosing its "contributions" and "expenditures." 26 U.S.C. § 527.

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[2] According to a news article, the recount fund was shut down in November 2001, at which time $270,000 in surplus funds were transferred to the Republican National Committee ("RNC"). Scott Lindlaw, *Bush-Cheney Recount Fund Shifts $270,000 to GOP in Parting Gift*, The Associated Press, Dec. 29, 2001. Disclosure reports filed by the RNC reflect that it received $270,000 from the "Bush-Cheney Recount Fund" on November 30, 2001. A disclosure report filed by the recount fund with the IRS shows a disbursement of $270,000 to the "RNC State Elections Committee."

On July 15, 2002, the Respondents filed a Political Organization Notice of Section 527 Status form with the IRS, and on July 27, 2002, filed disclosure reports with the IRS reflecting receipts and disbursements of the BCRF. These disclosure reports included a 2000 Year-End Report, 2001 Mid-Year Report, 2001 Year-End Report, 2002 First Quarterly Report, 2002 Second Quarterly Report, 2002 Post-Election Report, and a 2002 Year-End Report.

The Respondents' filing with the IRS does not erase two basic facts: 1) a political committee must report its recount receipts and disbursements to the Commission if the recount fund is a part of the political committee; and 2) the Respondents established and conducted the BCRF within the Bush-Cheney 2000, Inc. committee. The Respondents may have subsequently filed with the IRS. However, this does not retroactively change the Respondents' legal obligations under the Act.

Inasmuch as the Respondents failed to report the Committee's recount receipts and disbursements with the Commission, there is reason to believe that Bush-Cheney 2000, Inc. and David Herndon, as Treasurer, violated 2 U.S.C. §§ 434(b)(2)(J) and 2 U.S.C. § 434(b)(4)(G) and (I). In addition, Respondents were required to itemize receipts and disbursements of the recount fund when the receipt or disbursement was of an aggregate amount or value of $200 within the calendar year in 2000, and within the election cycle beginning in 2001. 2 U.S.C. §§ 434(b)(3)(G) and 434(b)(6)(A); 11 C.F.R. §§ 104.3(a)(4)(vi) and 104.3(b)(4)(vi). Therefore, there is reason to believe that Bush-Cheney 2000, Inc. and David Herndon, as Treasurer, violated 2 U.S.C. §§ 434(b)(3)(G) and 434(b)(6)(A).

The Respondents argue that the Committee was not required to report its recount activities because donations to and disbursement by a recount fund are specifically exempted from the definition of contribution and expenditure. However, the Commission's regulations require political committees to report all "receipts" and "disbursements" whether they constitute contributions or expenditures or not. 2 U.S.C. § 434(a)(1); 11 C.F.R. § 104.3.

Respondents argue that Advisory Opinions 1978-92 and 1998-26,[3] are not binding on the BCRF because the BCRF involves a publicly-funded presidential campaign, which is materially distinguishable from the privately-financed senatorial campaigns to which Advisory Opinions 1978-92 and 1998-26 were issued. Specifically, Respondents state that campaigns which receive funding from the Treasury of the United States operate under their own statutory scheme and implementing regulations that make their operation different from campaigns for the United States Senate and House of Representatives, and argue that this unique statutory and regulatory scheme and the receipt of public funding make these campaigns materially distinguishable from a congressional or senatorial campaign that is funded by private donations, citing by comparison *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 611-612 (1996). The Respondents also argue that the Commission's precedents "limit a presidential campaign's ability to rely on advisory opinions to fill gaps in the regulatory regime," citing *Statement of*

[3] As noted, *supra*, in Advisory Opinions 1998-26 and 1978-92, the Commission held that a separate organizational entity established solely for purposes of funding a recount effort would not become a political committee and would not be required to file disclosure reports, but if a federal political committee establishes any bank account for recount purposes the receipts and disbursements of those accounts would be reportable transactions of the committee, within the categories of "other receipts" and "other disbursements."

Reasons for the Audits of the Dole and Clinton Presidential Campaigns issued by then Commissioner Darryl R. Wold.

This matter does not involve "gaps" in the pertinent regulatory regime. The reporting provisions of the Commission's regulations apply equally to publicly-funded presidential campaigns and senatorial campaigns in all material respects. While presidential campaigns and senatorial campaigns must file their respective reports on different forms, *see* 11 C.F.R. § 104.2, both must adhere to the same requirements regarding the contents of disclosure reports, *see* 11 C.F.R. § 104.3; *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 491 (1985) ("FECA applies to all Presidential campaigns, as well as other federal elections, regardless of whether publicly or privately funded").[4] Furthermore, as a condition precedent to receiving public funds, the Respondents agreed to comply with the reporting requirements of the Act and the Commission's regulations. *See* 11 C.F.R. § 9003.1; Letter of Candidate Agreements and Certifications.

Respondents argue that even if the receipts and disbursements of the BCRF are found to be reportable transactions, pursuant to Advisory Opinion 1978-92, the BCRF was required to report only the aggregate amount of recount disbursements and is not required to itemize such disbursements. The Commission disagrees. It is true that in Advisory Opinion 1978-92, the Commission concluded that disbursements made by a political committee for recount purposes need not be itemized. At the time, however, the

[4] In addition to adhering to the reporting requirements set forth at 11 C.F.R. § 104.3(a) and (b), authorized committees of presidential campaigns must also file separate reports to disclose different general election activities. *See* 11 C.F.R. § 9006.1; Explanation and Justification for 11 C.F.R. § 9006.1; 45 Fed. Reg. 43377 (June 27, 1980)(provision intended to facilitate accurate accounting of the use of public funds, and is in addition to requirements at 11 C.F.R. § 104.3(a) and (b)).

Act did not require political committees to itemize disbursements other than expenditures. However, in the Federal Election Campaign Act Amendments of 1979, Congress added provisions that require itemization of receipts and disbursements that aggregate in excess of $200. Public Law 96-187 (January 8, 1980). These provisions were in effect at the time of the activity at issue. *See* 2 U.S.C. §§ 434(b)(3)(G) and 434(b)(6)(A); 11 C.F.R. §§ 104.3(a)(4)(vi) and 104.3(b)(4)(vi).

Finally, Respondents assert that the financial information required to be reported under the Commission's regulations was publicly disclosed on the Respondents' web site and through the media. Even if this is true, the Commission has never permitted a committee to satisfy the law's reporting obligations by choosing to disclose information through other, unofficial means. *See* MUR 3721 (Commission rejected argument by Perot '92 Committee that Commission's reporting requirements were obviated by media coverage of candidate's statements that he planned to personally finance his campaign).